

## ***Rules and Disciplines in Government Procurement Agreements***

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The negotiation of rules and disciplines established in the normative body of government procurement agreements has the aim of ensuring that the *principles of national treatment and non-discrimination* are fully enforced in all the steps and procedures that are present in the tendering processes carried out by governments.

Within this context, the goal of the present work is eminently practical and, therefore, attempts to provide a condensed overview of the main aspects and elements involved in the negotiation and on which – independently of their acceptance or rejection – the negotiators should concentrate their analysis and discussion. To this end, special attention will be devoted to examining the nature of these agreements and to the methodological aspects regarding general and specific issues that may be present. In some cases, the options will also be considered that should be taken into account in a negotiation in view of the diversity of models and alternatives that have been or may be drawn up.

### ***Nature and commercial importance of government procurement agreements***

In terms of the opening up and liberalization of trade, the government procurement market has gradually been transformed into one of the primary goals of the trade negotiations carried out in recent decades. Among the principal reasons for this trend is economic interest in markets whose significance has been estimated by the World Trade Organization (WTO) at a value that ranges between 10 % and 15 % of countries' GDP, which would point to a total amount close to 1,000 billion United States dollars.

It must be taken into account that since the creation of the GATT in 1947, government procurement has been left outside multilateral rules and disciplines and

market access commitments.<sup>1</sup> Only in the Tokyo Round were the first steps taken in this field, giving rise in 1979 to the Government Purchases Code. The latter was signed by thirteen countries and renegotiated during GATT's Uruguay Round, being transformed into a Government Procurement Plurilateral Agreement (GPA), originally adopted by only twenty-two countries, including the fifteen members of the European Community.<sup>2</sup>

This agreement in some cases coexisted, and in turn gave an a posteriori boost, particularly as of the second half of the 1990s, to negotiations and to the signing of government procurement contracts of a regional nature involving developing nations (DN).

NAFTA, in its chapter 10, included commitments on this issue which in some aspects were more ambitious than those reached in the GPA. An agreement was also signed by Mexico, Venezuela and Colombia (the Group of Three), Mexico and Bolivia and Mexico and Costa Rica. A posteriori, several countries in the Hemisphere participated in trade negotiation processes that have included, albeit without necessarily having concluded, a chapter on government procurement: MERCOSUR, FTAA, MERCOSUR-European Union, Chile-European Union, and more recently in the case of CAFTA.

It is worth stressing that during the 1990s the DN of the region witnessed a convergent process that favored the negotiation of this class of agreement. Basically, the protectionist trends of the past were reduced and the use of *buy domestic* policies ceased to have their previous priority as a tool for development and industrial production – although they did not disappear entirely.<sup>3</sup> At the same time, the need to carry out fiscal adjustments made it possible to transform, in some cases within the framework of the

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<sup>1</sup> Article III 8<sup>a</sup> of the GATT explicitly excludes “the acquisition of products aimed at satisfying the needs of public organizations and not for commercial resale or to serve for the production of merchandise destined for commercial resale” from the National Treatment and Most Favored Nation principles.

<sup>2</sup> For a more detailed analysis of the reasons why this Agreement did not obtain the concurrence of the DN, please consult Arrowsmith, Sue: “*Toward an Agreement on Transparency in Government Procurement.*” *PSIO. Occasional Paper. WTO. 1997*

<sup>3</sup> In some countries the *buy domestic* policies in their most varied forms have persisted alongside the so-called performance requirements, particularly in the awarding of public works, through the allocation of preferences to those suppliers that meet the demand for local content, technology transfer, association with domestic corporations, etc.

processes of reform of the State, the regulations covering government purchases, creating more open, competitive and transparent conditions.

Beyond the variety of agreements that were gradually reached, it needs to be said that in general terms these may encompass the negotiation of two mutually related substantive aspects, which constitute the set of commitments assumed by the parties.

In the first place, the negotiation of a normative framework which explicitly states the principles of *National Treatment* and *Non-Discrimination* for suppliers, goods and services originating in the countries that are members of the agreement and the rules and disciplines aimed at ensuring their concrete application through rules and prescriptions that hinder their avoidance.

Even though it is not formally explicit in the normative body of the agreements, a third principle has been invoked in the negotiations on the scope of the agreement: that of *Reciprocity*. In general, it must be said the presentation of the negotiating bids is carried out on the basis of a certain reciprocity, which can become even more demanding when it involves the opening up of specific sectors or subsectors, normally sensitive for member countries. For example, in the negotiations between the U.S. and Canada, the former conditioned the actual launching of the government procurement at the level of subcentral entities until it obtained a similar bid on Canada's part.

Secondly, in their *Annexes* the agreements include their specific scope, listing the entities, goods, services and public works covered by the agreement and whose contracts are regulated by the principles, rules and disciplines mentioned.

Consequently, a government procurement agreement sets itself the aim of overcoming barriers to market access that originate either in the national regulations that limit such access through the diverse "buy domestic" programs, or in those that emerge from the rules that regulate the tendering process in its diverse stages, from drawing up the specifications to the awarding of the contracts. These may hinder and, in some cases, preclude the participation of foreign suppliers through rulings of different kinds. Some of these regulations also refer to transparency procedures, in particular to the

content of the specifications, the time periods for advertising, the presentation of bids, the criteria for the allocation of contracts, access to claim mechanisms, etc.

Some variations may be noted in the agreements signed to date and in the negotiation proposals that have been recorded in different forums. In this sense, there are agreements with market access commitments but with the application of domestic legislation, i.e., without common disciplines (Group of Three) or with the possibility of negotiating only on transparency rulings, as has been proposed at the WTO, without listings of entities, goods and services.

### ***Negotiation Methodology: general aspects***

The assumption on which the following is based is that it refers to the negotiation of a comprehensive agreement, i.e. one which encompasses commitments on rules and procedures that regulate market access according to the scope agreed on by the countries involved, such as can be found in the current draft for FTAA, in chapter 10 of NAFTA or in the GPA.

In general terms, the negotiation of the normative framework demands several steps, which it is useful to follow not only to agree on the extension and depth of the rules and disciplines that will be included in it but also to organize its discussion and negotiation.

In the first place, it is convenient to draw up a guide to the subject matter that contains the elements that the countries consider necessary in order to define the agreement's scope, rules and disciplines. By way of example a non-exhaustive listing of basic issues is presented, divided according to their nature, on which basis the negotiation must be launched.

#### *Issues relative to the scope and applicability of the agreement*

- a. Definition of the concept of government procurement
- b. Scope of the National Treatment principles and Non-Discrimination Clause
- c. Rules of Origin and eventual denial of benefits in the field of services

- d. General exceptions

*Issues relative to Transparency*

- a Rules on technical specifications
- b Rules on valuation of contracts
- c Forms of tender and rules for selective and restricted tenders
- d Registry and ranking of suppliers
- e Rules for drawing up tender specifications
- f Rules for the publication of the procurement, presentation of bids and awarding of the contracts
- g Performance requirements or compensations
- h Negotiations

*Institutional questions and issues relating to the application of the agreement*

- a Objections and claims
- b Solution of controversies
- c Statistical data and information system
- d Amendments and modifications
- e Special and differential treatment
- g Institutions
- h Glossary of terms

Secondly, and once having agreed on the tentative agenda – which may suffer modifications over the course of the negotiation – proposals must begin to be offered on aspects to consider on each of them or on texts and the technical discussion must be fully entered into, then undertaking the search for consensus under the formal guise of writing the text of specific articles.

Thirdly, it is important to take into account that the negotiation of the normative framework must be definitively brought to a close once there is agreement on the specific scope of the agreement, i.e. the attached listings that will state the level of market access attained. This ensures not only the consistency of the entire agreement

but, in addition, the balance and equilibrium that the parties may seek in the negotiation. For example the level of the value thresholds of the contracts may be related to the level of the entities offered, their central or subcentral nature and the goods and services included or excluded according to whether positive or negative lists are used.

### ***Methodology of the negotiation: specific aspects***

#### ***The concept of government procurement***

From a logical standpoint, the negotiation of the normative framework should start with the concept of Government Procurement. Nevertheless, from a chronological standpoint this is not a subject that, given its eventual implications, triggers a speedy consensus, and, consequently, its definition may be postponed for the close of the negotiation, when the scope of the agreement is definitively delimited in the attached listings that form part of the agreement. Some cases may even lack a definition within the agreement and thus the definition contained in the domestic legal systems is implicitly or explicitly considered to be accepted. The risk in this case is that the concepts may be very different and, depending on the precision of the rules negotiated for determining the coverage and scope of the agreement, subsequent difficulties and eventual controversies may ensue.

The discussion of the concept often leads to the negotiation of the name of the agreement itself, the range of options including, in addition to the one herein employed, the terms Public Purchases, Government Purchases, State Purchases, Public Acquisitions, etc.<sup>4</sup> This happens because there often exists the fear that the choice of the term may be suggesting a specific scope for the agreement.

In order to broach the discussion of the concept and of the term to be employed, it must be taken into account, firstly, that government procurement, in order to be such, implies two conditions: *(a) that there exist a financial outlay by the State for the purchase of goods and services not destined to be marketed, and (b) that the public regulations*

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<sup>4</sup> In this work the term Government Procurement is adopted because it is considered to be the most comprehensive one since it allows inclusion of the diverse forms of purchasing considered in international agreements, among them rental operations, with or without the option to buy, the direct supply or concession of services, not necessarily of public works or services.

*existing for this purpose be applied.* These two conditions are present in all contracts carried out by the State. However, cases exist that have generated a legitimate discussion about their inclusion or lack of it in a government procurement agreement, in particular under the government enterprise privatization processes, be they or not for the supply of public services, in which the private operator must, under the terms of the contracts signed with the government, submit to certain rules – for example, to give preference to local suppliers of specific goods and services. Consequently, these are contracts that employ private funds but that submit to governmental regulations that introduce barriers to access by foreign suppliers.

Secondly, another element to take into account is the increasing interest, particularly among developed countries, in incorporating *public work concessions* into the negotiation of these agreements, a fact achieving concrete form with the signing of the FTA between the U.S. and Chile.

This discussion in turn introduces, in case the inclusion of the latter is accepted, the negotiators' need to specify if it is the initial contract for a tender issued by the State to award the concession, for example, of a service or the exploitation of a resource, or if it also extends to the future contracting to be carried out by the concessionaires.

Thirdly, in terms of scope, the negotiation involves a definition regarding the institutional level of the entities encompassed by the agreement (central, subcentral, etc.), if a positive, negative or mixed listing will be chosen, and, in case it is positive, if they will be incorporated in the future through successive rounds of negotiations. As a negotiating method, when it comes to goods involving large numbers and heterogeneity, it is not advisable to employ positive lists. They are debatable in the case of services and public works. The advantage of negative lists is that they ease the process because the countries do not need to carry out an exhaustive analysis of the markets of the counterparts, save for the economic or other significance of the services or works included in the negative lists. Nevertheless, it must be recognized that the choices are influenced by the negotiating strategies, particularly when facing exercises in different forums, be they of a bilateral, regional or multilateral nature. Such is the case if one wishes to preserve a bilateral or regional preference that cannot be transferred to other

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partners or to a multilateral level, if the case should apply, at least for a specific period of time. Certainly, if the government procurement agreement is included in the framework of a FTA, in theory the goal of a substantial liberalization should be met. A negotiating option based on positive lists should, consequently, unfold in tandem with the commitment to carry out successive negotiating rounds to be completed within a specified period of time or a gradual opening up, with different deadlines according to the entities, goods, services and public works.

The discussion on the scope leads to the question of eventual limitations on the latter, be it because of *general exceptions* to the agreement, be it for reasons of security, public health, public order, the environment, intellectual property protection, etc., or because of contracts that will be excluded by virtue of their amounts should *value thresholds* have been negotiated for this purpose.

In this regard, at least two aspects need to be considered in the negotiation of this specific point. One of them is the existence of different political and institutional systems, since, unlike federal States, countries that have a unitary system cannot make a proposal with the imposition of limitations of a state, provincial, regional or municipal nature. In these cases, the scope of the agreement necessarily extends to the entire national territory. The other aspect refers to the technical studies that the countries must carry out to decide even on the acceptance of its existence. In this regard, an evaluation must be made, among other factors, of how far their own markets have already been opened up and of each country's productive and exporting realities, in offensive and defensive terms – in other words, as a function of sectorial sensitivities on the domestic market and of competitiveness in foreign markets, at central and subcentral levels.

Lastly, *the scope and the application* of the agreement are specified, in some cases detailing the forms of contracting that it encompasses (cash or term purchases, rentals, rentals with the option to buy, leases, etc.) and also those purchases that may be excluded, such as donations, works of art, certain public services (e.g. social security, enforcement of laws, public education), etc. Additionally, these specifications normally admit the incorporation of general exceptions, usually associated with purchases linked to cases of emergency, natural disasters, materials for defense and national security, for



the protection of the health and morals of the population, etc., along with the undertaking not to employ these reasons to avoid the commitments of the agreement.

### ***The principles: national treatment and non-discrimination***

These are the two basic principles on which trade agreements are based, and, in this case, those on government procurement. This implies giving the suppliers, goods and services of the parties the same treatment as domestic ones and a treatment no less favorable than that given to those of any other party, without discriminating among the established suppliers by virtue of their being companies of domestic or foreign ownership, nor among goods because of their foreign nature, applying to the latter the rules of origin that are employed in normal trade operations.

As regards services, Article 10 of NAFTA may be used as a reference; through it, specific conditions under the *denial of benefits clause* have been imposed in those cases in which the control or the ownership of the former doesn't belong to nationals of the signatory countries who, at the same time, do not carry out substantial commercial activities in the territories of the agreement's member countries. This clause, however, is not included in the recent agreement between the U.S. and Chile. In case such a clause is accepted, the negotiation should be rounded out with some reference to the moment of its application. In other words, to ensure the transparency of the tendering process, no country should apply this clause a posteriori of the awarding of the contract.

As regards the *principle of non-discrimination*, its negotiation obviously involves specific aspects related to the level of preference that the partners in the agreement mutually wish to offer. In other words, through this principle it may be negotiated whether the access awarded will extend multilaterally to all the signatory countries or if it will be based on bilateral listings. Certainly, this discussion also leads to considering whether the existing preferences in regional agreements will be offered to the other parties in a new agreement or whether, on the contrary, these regional preferences will persist over a period of time to be negotiated.

### ***Rules for the valuation of the contracts***

When the agreements contain disciplines for contracts limited to specific thresholds, the need may arise to establish rules to avoid the skirting of the commitments undertaken. These rules are, basically, related to:

- (a) the need to avoid the subdivision of the contracts for the purpose of placing them below the agreed-on threshold values, and
- (b) the method chosen to establish those values, i.e., what remunerations must be taken into account in the determination of the amount of the proposal (e.g. commissions, fees, cash price or in installments and in the latter case the respective interest, etc.). In this context, it must be noted that tenders may involve more than one contract and rules may consequently be established for the valuation of all of them.

### ***The negotiation of the rules on transparency***

The agreements are not limited to proclaiming the application of national treatment and the enforcement of a competitive process for a scope to be negotiated; rather, they additionally seek to establish rules that ensure that application. One set of these rules is called *rules of transparency*, which, among others, include issues linked to the advertising and dissemination of guidelines and tenders, the establishment of deadlines and procedures, the criteria which the various forms of tender must follow, the system for ranking suppliers, the submission, reception and opening of the bids, the technical details of the products and services listed in the tender specifications, the criteria for awarding the contracts, the institutions and mechanisms, for solving claims or objections, that are needed for the claims made by suppliers.

### ***Forms of tender***

Countries practice different forms of tender, understanding the latter to be the public tender, the selective or private one and the restricted tender or direct purchase. To this end, each national legislation establishes different application criteria. Nevertheless, since some of them can, particularly in their operational aspects, become transformed into trade barriers, all these forms must be subjected to rules and disciplines that ensure that national treatment is given.

Both national legislation and international agreements follow the general principle of competition to ensure quality and reasonable prices. Only in the face of special circumstances is direct or restricted contracting admitted.<sup>5</sup> The reasons may vary and are usually stipulated in national legal systems (low-amount contracts, purchases for the area of defense and security, sole supplier, when a tender has been declared void and the steps demanded by national rules have been exhausted, etc).

In all cases, international agreements must explicitly state under which conditions this form of purchasing must be implemented so as not to undermine the application of national treatment nor the application of a truly competitive process. The same should pertain to selective or private tenders. Below, some difficulties are pointed out linked to advertising and to the participation of foreign suppliers that may emerge if some disciplines are not established in this regard.

### ***Advertising***

The issues linked to advertising encompass both the dissemination of the laws and rulings and the actions aimed at providing suppliers with all they need to know in order to be able to participate in a tender process. In this context, the diverse aspects that are detailed below must be taken into account.

### ***Invitation to participate in relation to a foreseen contract***

The announcements of foreseen contracts may have different purposes in the sense that they may be aimed at making the intention known of a future purchase and collecting information on those who may be interested – who will later be invited to submit their bids – or aimed at announcing and disseminating the details of a specific tender.

This is a subject that methodologically involves diverse elements that must be taken into account during the negotiation. One set of these is related to the minimum information required in the advertisements for a tender in order to ensure a complete

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<sup>5</sup> When direct contracting is carried out, some countries' legislation nevertheless establishes the requirement to request and evaluate a minimum number of bids.

knowledge of what is required and, therefore, the participation of domestic and foreign suppliers. In this regard, one key issue is that of the opportunities provided for taking cognizance sufficiently in advance of the tender. Secondly, the deadlines provided for the submission of the bids and, if applicable, for carrying out the required qualifying or pre-qualifying process, in other words, the legal, economic and financial conditions demanded from suppliers and the type of acquisition (purchase, rental or any other form).

Another set of aspects is linked to the media, be they print or electronic, for the placement of the advertisements. Special consideration must be given to which are the most appropriate media in which to invite participation in selective or private tenders, with the aim of ensuring the participation of the largest possible number of suppliers.

### ***Deadlines for responding to the invitation***

In order to ensure an equitable treatment when responding to an invitation to bid, it is convenient to establish a rule involving a specific and equal deadline for all participants, domestic and foreign, in relation to the form of tender involved. In this manner it is also attempted to harmonize the different deadlines that are stipulated by each national legislation and a reasonable timespan is ensured for drawing up and submitting the bids. At the same time, it must be considered that these deadlines may be made flexible in response to different situations, for example if there has previously been an advertisement of the intention to purchase these products and/or services, if they refer to contracts linked to others that are being implemented, if duly justified reasons of urgency exist, etc., and also to the media that are employed. If the media chosen are electronic, one may consider shorter deadlines than those required for written submissions carried out directly at the tendering entity or by mail.

### ***Content of the tender specifications***

The content of the specifications is a key element in the purchasing process since the criteria therein spelled out are the basis on which the evaluation and awarding of the contracts will be carried out. In this regard, certain rules should be established aimed at ensuring the inclusion in the specifications of clear information on these criteria,

on the foreseen timetables and on the place to submit the bids and on where and under what conditions they will be opened, attempting to ease the process of preparation and submission of the required paperwork. Additionally, it is necessary to specify issues relating to the language in which the submissions are to be made, the description of the products and services that will be requested, the form of payment, the origin of the funds, the model of contract, the conditions demanded from suppliers, etc.

Another rule to be defined in the specifications refers to the means chosen for the submission of the bids (in writing, in closed or sealed envelopes, by electronic means, by mail, etc.), and this matter deserves an analysis of the legislative and technological state of each of the countries.

### ***Technical conditions***

Every process of purchasing a product or service must involve the description in the specifications of the technical qualities demanded as a function of the use to be given to the product or service demanded. On occasions this description can lead to the annulment of a really competitive process if the guidelines or standards demanded are drawn up for the benefit of a specific provider or brand and not, for example, on the basis of the properties demanded of the product or service requested. Consequently, it is necessary to negotiate rules that lead to the application, insofar as possible, of international technical standards or recognized national standards.

### ***Registry and ranking of suppliers***

The majority of countries have a registry of suppliers, be it for goods and services or for the construction of public works. Their nature varies. In some cases, especially when the purchase of goods and services is involved, these registries are of a merely informative character for State agencies and are not compulsory. The qualifying is therefore carried out in the bid evaluation stage. In other cases, especially when they involve the construction of public works, the registry operates as a prior and compulsory *qualifying or pre-qualifying* that the supplier must comply with in order to carry out contracts with the government insofar as it meets the *legal and economic* requirements demanded by national legislation. In particular, in these cases, the disciplines that are

negotiated must be carefully analyzed to avoid any discrimination in the registration and pre-qualifying process and any deviation from the goal, which is to ensure that the suppliers have the legal, economic and technical capacity to meet the purpose of the tender. At the same time, it is particularly important to take into account that some countries may have different registries for domestic and for international tenders. If the registration of foreign suppliers is not facilitated in national tender registries, it may invalidate national treatment and, above all, affect the participation of foreign companies in private or selective tenders. To avoid this situation, it is necessary to analyze and discuss the necessary modification of national registration and pre-qualifying systems in terms of the requirements and the paperwork demanded for complying with these procedures.

Likewise, it is important in the qualifying process to set down the commitment to provide long enough deadlines for foreign suppliers to be able to comply with the conditions imposed, to see that the latter are no less favorable than those established for domestic suppliers and to pay attention, especially from the standpoint of technical capacity, both to the local commercial activity and to the overall activity of the foreign company.

### ***Submission, reception, opening of the bids and awarding of the contracts***

The rules for the submission and reception of the bids must be established in the tender specifications, along with the methodologies and timeframes that will ensure a truly competitive process among the suppliers under the agreement.

At the same time, and as has already been mentioned, negotiating rules that will be contained in the specifications not only ensures transparency in the process but, additionally, makes it possible to establish the basis for handling potential claims between the private parties and the tendering entity and, if applicable, among States, through the mechanisms that are established for bridging differences. Basically, the award must be made in accordance with the criteria spelled out in the specifications, which, in turn, are linked to the price and quality of the products, services and public works requested and to the supplier's capacity to fulfill the contract. At the same time, the existence must be contemplated of mechanisms that the countries may apply to

handle cases of bids with abnormally lower prices in order to rule out the presence of fraudulent action, dumping or subsidy. Also, it is necessary to analyze the formulation of rules on public information on the awards made by the entities to include basic information on the process carried out and in particular, at the request of the participants who did not obtain the award, on the reasons for their exclusion. However, in all cases in which information is provided, as a general rule it is convenient to establish in the agreement that government entities are obliged to safeguard the interest of the corporations insofar as confidential information about them is involved.

### ***Performance requirements***

Performance requirements or banning of offsets are an important aspect of the negotiation process and are of notable interest to DN. Some countries' national legislation contains demands on foreign suppliers, particularly in tenders for public works, in order to favor local development and domestic production, technology transfer, compensated trade, etc. The request for compensation may be present at any of the stages in a tender process.

In some agreements, such as NAFTA, or more recently the U.S.-Chile FTA, they are forbidden in all stages of the process, but in the GPA it is accepted that DN shall have the possibility of introducing them in the supplier qualifying or licensing stage, albeit not as a criterion for awarding the tender. In this way, by excluding them from the awarding stage it is attempted to preserve the competitive nature of the tender process.

### ***Negotiations***

In certain tenders it is possible to include a clause on the acceptance of negotiations between the entity and suppliers when no one bid is clearly better than another. If a clause of this kind is accepted in the agreement, it becomes necessary to establish rules about the confidentiality that must mark the process, the application of the evaluation and awarding criteria established in the specifications and the elimination of bidders on their basis. At the same time, the potential application of this process should already be contemplated in the specifications themselves.

### ***Objections and claims***

This is one of the key issues in relation to the rules on transparency because it also pertains to confidence in the institutions and in the rules in force. In fact, in the international sphere, as of the Public Purchases Code of 1979, the rules in relation to this issue contained in the GPA and in the agreements signed a posteriori by the U.S. and the European Union have been strengthened as regards several issues that, in methodological terms, need to be considered. In the first place, it is demanded that consideration be given to inclusion in the agreement of the commitment to establish an independent administrative or judicial authority, without a specific interest in the purchases of the contracting entities, in charge of examining the claims of suppliers, before which the latter may appeal decisions on a given tender. Secondly, that suppliers be given enough time to submit their claim and the possibility of a suspension of the process, if this is not contrary to the public interest because of the nature of the products or services demanded, until the situation is solved judicially. In the third place, the countries must discuss not only mechanisms and procedures that will enable a proper use of the right of appeal before independent organs but, additionally, that avoid discrimination against the suppliers in future tenders by the entities against which they exercised the right to make claims.

### ***Solution of differences***

Unlike the commitments mentioned for handling claims, the mechanisms for the solution of controversies refer to disputes among the States party to the international agreement. The discussion on this point is on whether special mechanisms are needed, different from those that may exist in general for a free trade agreement.

In principle it is convenient to take into account that the subject of controversy would be the possible noncompliance by a State with the commitments undertaken under the agreement, and in this case, the procedures should be followed that are established in the chapter on solving controversies in a free trade agreement. Nevertheless, it is interesting to note that certain specifications are established in the GPA that seek to modify some timespans and procedures of the WTO Understanding on the Solving of Differences in order to speed up the process, ensuring time frames that



are compatible with the nature of the issue under litigation, guaranteeing the technical capacity of the members of the special groups, etc.

### ***Amendments and modifications***

The agreements must contemplate clauses that enable amendments and modifications to be made to them. Basically, these are related to the range of entities, products, services and public works that form part of the annexes. In this context consideration must be given to minor or formal amendments, such as changes in the name of the government entities, obviously without allowing the modification of the institutional structure with the aim of avoiding the commitments made under the agreement.

It is also possible that the access commitments agreed on will find themselves affected by the privatization of some entity, which a government may decide on a posteriori of the entry into force of the agreement. In this case, even if the entity has been entirely removed from the State's control, the possibility may be considered that the other countries evaluate how this will affect the balance of the agreement and therefore the possibility of demanding some compensation.

### ***Statistical information systems***

Statistical information on the procurement carried out by States is doubly useful. On one hand, it permits knowledge to be had on the size of the markets and, on the other, once the agreement has come into force, makes it possible to have an instrument of control over compliance with the commitments undertaken.

The specific rules to be negotiated should consider:

- (a) the content and degree of itemization of the information that each country must be in a condition to supply, and
- (b) the adoption of specific systems for the classification of similar or compatible goods, services and public works among the member countries of the agreement.

This demands, in each of the countries, in addition to the adoption of the mentioned classification system, the design and setting up of an information system that connects each of the government's agencies with a focal point from which the information is sent on all the procurement carried out, basically specifying some of the following variables: *name of the agency, form of tender, origin of the corporation, product or services acquired or work carried out, amount of the contract, its duration, form of payment, etc.*

Compliance with these rules must take into account the need to meet the goals sought in the least costly manner as regards resources and procedures. It must be considered that in most countries of the hemisphere the systems are precarious and incomplete. To a great extent this is so because, in the absence of the development, in a strict sense, of special information systems for government procurement, existing statistics originate in the aggregate information provided by the systems for the classification of goods and services employed in drawing up national budgets.

It is evident that every day there is an increase in the employment of new technologies in all areas, including government stewardship in the field of procurement. In this regard, the development and use by the countries of a similar software for government purchases, an integrated network for the dissemination of information on business opportunities, and the creation of a data base, should be submitted, among other matters, to the analysis of a group of experts of the countries involved. In the same way, technical cooperation undertakings in this field in favor of the countries facing the greatest difficulties would deserve particular attention during the negotiation of the agreement.

### ***Institutions***

In the institutional sphere the convenience should be analyzed of creating a committee on government procurement charged with supervising and evaluating the enforcement of the agreement. In case its creation is accepted, its nature should also be evaluated as well as its permanent or transitory nature.

### ***Special and Differential Treatment (SDT)***

In accordance with the experience accumulated in the multilateral system, and in particular with what has been established, at least in a merely declaratory manner, in the GPA, negotiations between developed countries and developing nations or small economies include a chapter allocated to SDT.

The scope of the SDT may vary significantly as a function of the numerous factors involved in a negotiation. Among other elements, it may encompass the inclusion of:

- (a) Special prerogatives in terms of access to markets in the more developed countries, special preferences being established in specific sectors or products, gaining access to contracts without limitations in terms of thresholds, etc.
- (b) Slower opening up of the domestic market and higher thresholds for certain tenders. Eventual reserves.
- (c) Mechanisms for handling emergency situations and sensitive sectors.
- (d) Different time frames for the adoption of procedures, guidelines and institutions.

### ***Final considerations***

The negotiation of the normative framework of a government procurement agreement may have a greater or lesser scope or depth. In this context there is no sole model and, consequently, different alternatives may be envisioned. A framework with an abundance of stipulations such as NAFTA or the GPA tends to avoid the possibility that given national procedures may be employed to avoid the real application of the goals and principles linked to the liberalization of government procurement markets. At the same time, prudence must be exercised so as not to generate so detailed an agreement that it will be hard to manage, that it generates unnecessary costs and, above all, that it is not compatible with the countries' capabilities and financial and institutional resources. Hence there today exist agreements with a lesser number of rules, which can also meet specific national realities in the countries involved.

Consequently, the elements and aspects developed in the present document have only attempted to broach, in the light of existing agreements and experiences, all that, by virtue of its importance, ought to be methodologically included in the analysis and discussion of any government procurement negotiation. Its inclusion or exclusion from the text of the agreement will, ultimately, depend on the final choice made by the countries within the framework of a specific chosen model.

Lastly, it should be taken into account that the stipulations contained in an international agreement of this kind do not replace but rather complement those that exist in national legal systems. Nevertheless, they may demand that some of them be adapted, in particular those of an operational and administrative nature, for the purpose of adjusting them to the commitments agreed on regarding deadlines and procedures and those of an institutional nature, such as the addition of new levels and mechanisms for handling eventual claims by suppliers.

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